Supreme Court, U.S.
FILED

041252 MAR 9 - 2005

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No. _____

In the Supreme Court of the United States

AMERICAN PELAGIC FISHING COMPANY, L.P.,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In response to the federal government's invitation to U.S. fishermen to deploy large vessels to harvest under-utilized fish stocks, petitioner American Pelagic Fishing Co., L.P. ("APFC") invested $40 million in such a vessel, the *Atlantic Star*. After all required fishing permits were issued, Congress enacted special legislation revoking only the *Atlantic Star*'s permits and adopting vessel size limits barring only the *Atlantic Star* from fishing in any U.S. fisheries. The trial court found that the legislation deprived the *Atlantic Star* of all economically viable use and effected a compensable taking.

The court of appeals for the Federal Circuit reversed without performing any takings analysis. It held that the government's authority to regulate fishing precludes vessel owners from having a compensable property interest in using their fishing vessels to fish.

The questions presented are as follows:

1. Whether the government's authority to regulate a traditional property use is a "background principle" that excludes such a use from the owner's title and allows the government to restrict or abolish the use without any risk of takings liability.

2. Whether special legislation that targeted a single property owner, deprived that owner's property of all economically viable use, and defeated that owner's reasonable investment-backed expectations was a taking requiring the government to pay just compensation, as the trial court held on an undisputed factual record.

RULE 29.6 STATEMENT

Petitioner has no parent corporation, and no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner American Pelagic Fishing Company, L.P. ("APFC") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-36a, *infra*) is reported at 379 F.3d 1363. The order of the court of appeals denying petitioner's petition for rehearing en banc (App. 117a-118a) is unreported. The liability opinion of the Court of Federal Claims (App. 37a-70a) is reported at 49 Fed. Cl. 36. The damages opinion of the Court of Federal Claims (App. 71a-116a) is reported at 55 Fed. Cl. 575.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 2004. Petitioner's timely petition for rehearing en banc was denied on December 9, 2004. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant statutory provisions are reproduced in the Appendix (App. 119a-123a).

STATEMENT

The facts relevant to the takings claim are "not in dispute." App. 2a. The government first induced petitioner APFC to invest in a large fishing vessel, the *Atlantic Star*, to harvest under-utilized fish stocks in the Atlantic fisheries; next issued all required fishing permits to the *Atlantic Star*; and then, at the behest of rival fishermen, enacted special legislation revoking only the *Atlantic Star*'s permits and barring only the *Atlantic Star* from fishing in any waters in the Exclusive Economic Zone of the United States ("EEZ").

This special vessel legislation—the first of its kind in U.S. history—excluded only the *Atlantic Star* from operating anywhere in the EEZ while grandfathering all other authorized vessels that exceeded the new size limits. App. 119a-123a. The legislation was unforeseeable under the existing Magnuson Stevens Act[1] regulatory scheme; indeed, it specifically overrode that scheme, making it "uniquely unavailable" to petitioner. App. 54a. The legislation deprived the *Atlantic Star* of all viable economic use. *Id.* at 66a-67a. Following a careful application of the three-factor takings test set forth in *Penn Central Transp. Co.* v. *City of New York*, 438 U.S. 104, 124 (1978), Court of Federal Claims Judge Bruggink concluded: "[I]f the Constitution doesn't protect private property under these circumstances, then I don't think it's worth the paper it's written on." CA App. 4624-4625.

The Federal Circuit reversed the trial court's judgment not by disputing its painstaking *Penn Central* analysis, but rather by reaching the astonishing conclusion that APFC was not entitled to any takings analysis because it did not have a compensable property interest in use of the fishing vessel it owned. According to the court, the United States' right to regulate fishing "precluded any permitted fisherman from possessing a property right in his vessel to fish." App. 28a.

The Federal Circuit thus held that the Fifth Amendment does not protect property uses over which the government has asserted regulatory authority. The implications of that ruling are staggering. Even if the decision were limited to regulated uses of personal property in public areas, like the use of a vessel in the EEZ—although the decision contains no suggestion that its reach is so limited—the consequences for the security of business investments would be alarming.

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[1] The 1976 Magnuson Fishery Conservation and Management Act, renamed the Magnuson-Stevens Fishery Conservation and Management Act when substantially amended in 1996, is codified at 16 U.S.C. § 1801 *et seq.* (hereinafter "Magnuson Act").

At minimum, the decision places the heavily regulated fishing and transportation industries—which invest billions of dollars in personalty such as cargo vessels, oceanliners, trucks, and airplanes for use in public spaces (such as the EEZ, internal waters, federal highways, and U.S. airspace)—on notice that the personalty uses they currently "enjoy," though now legal, are simply uses that the government has not yet "chose[n] to disturb." App. 24a. The government may at any time, according to the court of appeals, adopt unforeseeable use restrictions rendering such multi-billion-dollar property valueless, yet risk no obligation to pay just compensation.

Further, the Federal Circuit did not limit its ruling to uses of personal property. Its analysis applies equally to all uses of real property that, like uses of a vessel, are subject to regulation. Under the Federal Circuit's analysis, local ordinances requiring building permits and federal legislation governing wetlands use would preclude real property owners from acquiring a compensable property interest in building on their property by rendering it a matter of regulatory "permission." App. 29a. The government thus could impose new restrictions on the right to build a house on private property without restraint by the Takings Clause. As the Court has made clear in numerous cases, that is not the law.

The ruling below conflicts directly with *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992). In *Lucas*, the Court held that the Takings Clause protects an owner's interest in using property in any manner not excluded from its title by "background principles" of property law. The court of appeals acknowledged that use of a vessel to fish in the EEZ was ***not*** proscribed by any "background principles" of common law—let alone by the Magnuson Act or its regulations, which govern fishing in the EEZ—when petitioner purchased the *Atlantic Star*. See Part I, *infra*.

But the Federal Circuit dramatically expanded the *Lucas* exception to the Fifth Amendment's protection. It deemed not only common-law and statutory schemes that ***prohibit*** particular uses, but also regulatory schemes that ***allow*** particular uses, to be "background principles" of property law that exclude such uses from title. The court reasoned that one cannot acquire a property interest in a use that is subject to governmental permission. App. 29a. In so ruling, the court of appeals excluded from Takings Clause protection most profitable property uses in our modern regulated world because most property uses require regulatory permission.

The court of appeals' decision also conflicts directly with *Palazzolo* v. *Rhode Island*, 533 U.S. 606 (2001). *Palazzolo* held that the fact that a particular property use was regulated before a new owner acquired title did not necessarily foreclose his claim that the preexisting regulation confiscated his property and that compensation was due. If a preexisting regulation proscribing a particular use does not necessarily foreclose an owner from acquiring a compensable property interest in the proscribed use, *a fortiori* a preexisting regulatory framework ***allowing*** a particular use, but subjecting it to a permitting requirement (like the Magnuson Act), does not necessarily foreclose an owner from acquiring a compensable property interest in the permitted use. Yet the court of appeals held that it did.[2]

As *Palazzolo* makes clear, a preexisting regulatory scheme—like the Magnuson Act framework that governed

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[2] In so ruling, the Federal Circuit converted a single factor in the three-pronged regulatory takings analysis—the inquiry into whether the restriction at issue defeated reasonable investment-backed expectations—into a threshold bar to the acquisition of a property interest and thus to any takings analysis at all. As we explain in Parts I.B and I.C, that ruling directly conflicts with this Court's decisions in *Palazzolo* and *Andrus* and numerous decisions by other courts of appeals.

APFC's right to fish—does not foreclose a *Penn Central* regulatory takings analysis, as the court of appeals held. Rather, as Justice O'Connor explained in her concurrence (533 U.S. at 634), and as the Court previously explained in *Andrus* v. *Allard*, 444 U.S. 51, 64 n.21 (1979), the existence of a regulatory scheme is but one factor in the "reasonable investment-backed expectations" prong of that analysis. The decision below, which impermissibly converts a single factor affecting one prong of the *Penn Central* analysis into a threshold bar to any analysis, thus is irreconcilable with *Palazzolo*. It also conflicts directly with the many decisions of the Federal Circuit's sister circuits deeming the government's regulatory authority to be but one factor in the *Penn Central* reasonable expectations inquiry rather than a bar to the very existence of a compensable property interest.

The petition should be granted to reverse the Federal Circuit's radical revision of regulatory takings jurisprudence. To allow its decision to stand would grant "the government[] power to redefine the range of interests included in the ownership of property" without "constrain[t] by constitutional limits" in stark violation of the Fifth Amendment. *Lucas*, 505 U.S. at 1014.

Factual Background. During the mid-1990s, federal governmental bodies actively urged U.S. fishermen to outfit large fishing vessels for entry into the underfished Atlantic mackerel and herring fisheries in the EEZ. A study commissioned by the United States Senate Finance Committee and prepared by the United States International Trade Commission concluded that only much larger ships than currently existed could provide the "economies of scale" necessary to improve the competitive position of U.S. fishermen in relation to European rivals. CA App. 624, 637. The National Marine Fisheries Service, the federal agency responsible for overseeing the EEZ fisheries, repeatedly reported that Atlantic mackerel and herring stocks were at record highs and

were woefully underfished. *Id.* at 610-614, 743-746, 748-749, 783, 808-809, 880-884.

Lisa Torgersen, a Seattle resident with extensive commercial fishing experience, accepted the government's invitation to outfit a large vessel to fish these stocks. She established petitioner, which invested $40 million to develop the *Atlantic Star*, a state-of-the-art vessel designed for "clean" mackerel and herring fishing that minimizes by-catch and other incidental environmental impacts. CA App. 602-603. The U.S. Coast Guard issued a Certificate of Documentation and, in early 1997, NMFS issued all required permits. *Id.* at 595, 599-600, 641.

In deciding to make her investment, Ms. Torgersen relied on the highly favorable regulatory regime governing this sector of the fishing industry. CA App. 595-96. Magnuson Act regulations required NMFS to issue and to renew Atlantic mackerel permits to all qualifying ships satisfying its conditions, like the *Atlantic Star*. 50 C.F.R. § 648.4(e), (j). NMFS had never revoked any permits other than for cause. CA App. 662-663. And the government previously had compensated permit holders when it reduced fishing capacity. *Id.* at 730, 793. Ms. Torgersen also knew that entry into these fisheries provided a vessel with valuable "historical fishing rights" that protected against later imposition of entry or catch limits. *Id.* at 730, 793, 3567.

As word of the *Atlantic Star* spread, opposition arose among local fishermen who feared competition from a more efficient vessel. App. 44a-45a. Members of the New England Fishery Management Council proposed limits on horsepower, length, and gross tonnage, carefully designed to exclude only the *Atlantic Star* and not their own vessels. Congress incorporated those limits in appropriations legislation it enacted in November 1997 (the "vessel legislation"), five days before the *Atlantic Star* was to launch. App. 45a; CA App. 825, 842.

The vessel legislation retroactively nullified only the *Atlantic Star*'s existing permits while leaving all other currently permitted fishery participants free to operate. App. 6a-7a; Pub. L. 105-119, § 616(a)(1). Further, it specifically excluded the *Atlantic Star* (*id.* § 616(b)) from a "grandfathering" provision (§ 616(a)(2)) that allowed all vessels exceeding the new size limits but possessing fishery endorsements as of September 25, 1997 (as did the *Atlantic Star*) to continue to operate in U.S. fisheries other than the Atlantic mackerel and herring fisheries. App. 119a-120a. The effect of that exclusion was to bar only the *Atlantic Star*—but not other vessels possessing fishery endorsements that exceeded the new size limits—from fishing in any regulated fishery in the EEZ.

Congress was well aware that, under the limitations it specified, the *Atlantic Star* would be "the only vessel * * * legislated out of existence." 143 Cong. Rec. E1556 (1997) (Statement of Rep. Metcalf). As Congress had anticipated, "no other vessel was affected by the legislation." App. 7a.

The legislation was the first in history to abrogate a vessel's existing permits or to bar a ship from fishing based on horsepower, length, or gross tonnage. App. 50a; CA App. 678, 869. Yet the legislative record contains no evidence that the *Atlantic Star* in particular—or large vessels in general—threatened any environmental or other harm. App. 47a-50a. The government's chief stock assessment scientist testified that the *Atlantic Star*'s entry into the Atlantic fisheries would have had no negative impact on mackerel or herring stocks, which were at "a historic level of high" abundance. CA App. 706, 709. NMFS publicly declared that Atlantic mackerel and herring stocks were neither "overfished" nor even "approaching overfished." NMFS, *Status of Fisheries of the United States* 11, 66 (1998) (CA App. 1033-1034). According to Senator Snowe, who sponsored the legislation, the fish stocks were "healthy" but "she had key constituents [who] were against" entry of the *Atlantic Star*. CA App. 3559.

The legislation removed any possibility of profitably operating the *Atlantic Star*. Without a mackerel permit, the *Atlantic Star* could not fish for Atlantic mackerel in the EEZ. 50 C.F.R. § 648.4(a)(5) (1997); App. 43a, 51a. Nor could it fish for herring, for which a permit was not required, because mackerel is an inevitable by-catch of herring fishing and because an authorization letter, issued to the *Atlantic Star* but abrogated by the legislation, is required to employ suitable nets in herring-abundant EEZ waters. 50 C.F.R. § 648.80(d); CA App. 605-606, 609, 791, 3575-3576. Nor could it fish for any other stock in the regulated fisheries of the EEZ because the legislation barred it from all those fisheries. App. 51a. Negotiating for foreign fishing rights, assuming their availability, would have taken years and a change of ownership or nationality, cost millions of dollars, and permanently barred the *Atlantic Star* from returning to U.S. fisheries. CA App. 616, 813, 3630. International waters lacked sufficient quantities of fish. *Id.* at 615, 3629-3630. Conversion to a non-fishing use would have been ruinously expensive and destroyed the value of the vessel and APFC's investment. *Id.* at 616.

Congress made the initially temporary restrictions permanent in May 1999. In July 1999, with the vessel deprived of any viable fishing opportunities and with creditors threatening to seize the vessel, petitioner's Dutch partners forced its sale. CA App. 617, 814, 3611, 4082-4083. In sum, the legislation deprived the vessel of all economically viable use for 20 months, and Ms. Torgersen lost her "entire equity investment in the *Atlantic Star*." *Id.* at 617.

Lower Court Proceedings. On facts that were "undisputed" and "deeply disturbing," the trial court[3] ruled on

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[3] The trial court had jurisdiction under 28 U.S.C. § 1491(a)(1), which provides that the United States Court of Federal Claims shall have jurisdiction over claims against the United States founded upon the Constitution.

cross-motions for summary judgment that petitioner had suffered a compensable temporary taking of its property, the *Atlantic Star*. App. 38a n.1, 54a. The court first held—as the government had conceded—that "[t]he *Atlantic Star*, *qua* ship, plainly constitutes property for Fifth Amendment purposes." *Id.* at 58a. The trial court further observed that fishing—the particular "use[] prohibited" by the vessel legislation—was "within the bundle of rights otherwise inherent in the vessel." *Ibid.* The court explained that such "personal property, like land, comes with an inherent right of use" absent a traditional or common law understanding excluding a particular use from title. *Id.* at 59a (citing *United States* v. *Gen. Motors Corp.*, 323 U.S. 373, 378 (1945)). No such traditional understandings exclude fishing from the title of a vessel owner, the court noted. *Id.* at 61a. The court specifically rejected the government's contention that APFC lacked a property interest in using its vessel to fish because its right to fish was subject to regulatory permission under the Magnuson Act: "To say that the plaintiff's rights to fish were subject to a pervasive regulatory scheme—plainly they were—is not to say that nothing the government did with respect to those rights could ever implicate the Takings Clause." *Id.* at 59a.

Applying the three-factor analysis set forth in *Penn Central*, 438 U.S. at 124, the trial court concluded that Congress here exceeded established limits on regulatory action by overriding the regulatory scheme to remove, retroactively, a single vessel's permits, defeating petitioner's reasonable expectations, and depriving the vessel of all viable economic use. App. 65a-67a. After a trial on damages, the court awarded petitioner just compensation equal to the vessel's fair rental value during the takings period. *Id.* at 115a-116a.

The Federal Circuit reversed without engaging in a takings analysis, holding that the government's action did not implicate any Fifth Amendment property interest. App. 31a. The court acknowledged that APFC had owned the *Atlantic*

Star. It also acknowledged that "use of the Atlantic Star to fish was ***lawful*** not only under traditional property and nuisance principles, *Lucas*, 505 U.S. at 1030, but also under the regulatory regime by which its permits were issued." App. 21a-22a (emphasis added). Nonetheless, the court held, APFC—and all vessel owners—lacked a compensable property right to use their vessels to fish in the EEZ because, by adopting the Magnuson Act, Congress had granted the government "conservation and management" authority over the EEZ. By so "rendering the ability to fish in the EEZ a matter of governmental permission," Congress had "precluded any permitted fisherman" who subsequently purchased his vessel "from [acquiring] a property right in his vessel to fish." *Id.* at 28a-29a. The court thus removed Takings Clause protection from all property uses that are subject to a preexisting regulatory or permitting scheme.

REASONS FOR GRANTING THE PETITION

I. THE FEDERAL CIRCUIT'S RULING CONFLICTS WITH DECISIONS OF THIS COURT AND OF OTHER COURTS OF APPEALS ON AN IMPORTANT FEDERAL QUESTION.

The Federal Circuit's ruling— that there can be no property right in a use that is subject to governmental regulation or permission—conflicts with precedents of this Court and other courts of appeals. The importance of this issue cannot be overstated. The ruling below would bar most regulatory takings claims at the threshold without any takings analysis, as it did in this case, because most regulatory takings claims involve property uses subject to an existing regulatory scheme. The court of appeals' ruling would thereby accord the government free rein to ban established uses of property without any check from the Constitution's just compensation requirement. The Court should reverse that ruling and instruct the Federal Circuit that the government's sovereign right to regulate does not insulate it from takings claims.

Where, as here, a regulation goes "too far," the Takings Clause requires the government to pay just compensation. *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922).[4]

A. The Federal Circuit's Ruling Conflicts With This Court's Decision In *Lucas*.

Lucas provided a framework for analyzing whether a proscribed use of property is a property interest subject to the Takings Clause. The Court held that the Fifth Amendment protects an owner's interest in using its property in any manner not excluded from its title by "background principles" of property law. 505 U.S. at 1029. *Lucas* stressed that the "background principles" exception is narrow, limited to nuisances and dangerous uses long proscribed by State property and nuisance laws. *Id.* at 1029-1030. A particular use of property is excluded from an owner's title only if it has "always" actually been "unlawful" under "existing rules or understandings." *Id.* at 1030; see *Phillips* v. *Washington Legal Found.*, 524 U.S. 156, 168 (1998) (applying the *Lucas* property analysis to intangible personalty).

The Federal Circuit acknowledged that *Lucas* controls this case. App. 22a-23a. It further acknowledged that petitioner's "use of the *Atlantic Star* to fish was ***lawful*** not only under traditional property and nuisance principles, *Lucas*, 505 U.S. at 1030, but also ***under the regulatory regime by which its permits were issued.***" App. 21a-22a (emphasis added). Under *Lucas*, that ruling establishes that petitioner had a property interest protected by the Takings Clause.

Rather than follow *Lucas*, however, the Federal Circuit radically expanded the narrow "background principles" exception to Takings Clause protection that *Lucas* had recognized. According to the Federal Circuit, particular property

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[4] Petitioner does not raise herein an alternative argument pursued below that it had a property interest in its permits.

uses are excluded from an owner's title not only by "background principles" of common law or State property or nuisance law ***prohibiting*** the particular use, but also by federal statutes and regulations ***allowing*** the particular use but subjecting it to regulation or permitting requirements. App. 28a. Specifically, the court deemed the Magnuson Act, which allowed use of a fishing vessel like the *Atlantic Star* to fish in the EEZ at the time APFC acquired title to the vessel, to be a "background principle" excluding use of such vessels to fish in the EEZ from owners' titles because it subjected such use to regulation and permitting. *Ibid.* According to the court, by granting the government "sovereign rights" to "conserve and manage" the EEZ, Congress immunized the government from the just compensation requirement for whatever new restrictions on fishing in the EEZ it might choose to adopt. *Id.* at 26a-28a.

That ruling conflicts directly with the *Lucas* holding that property uses are excluded from an owner's title ***only*** by "background principles of [State] nuisance and property law" that ***prohibit*** those uses. 505 U.S. at 1030. Under *Lucas*, a particular use is not excluded from the owner's title unless the State or an adjacent landowner could have had it proscribed by a court. *Id.* at 1029. As the Federal Circuit acknowledged, that was not remotely true regarding petitioner's use of its fishing vessel to fish: the property use at issue—petitioner's permitted use of its fishing vessel to fish in the EEZ—was perfectly "lawful" under "traditional property and nuisance principles." App. 21a-22a.[5]

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[5] In fact, use of a fishing vessel to fish in the area now comprising the EEZ is a traditional property use long recognized at common law. As this Court explained, "the common people of England have regularly a liberty of fishing in the sea [as] a public common of piscary, and may not, without injury to their right, be restrained of it." *Martin* v. *Waddell*, 41 U.S. (16 Pet.) 367, 412 (1842). The right to use a fishing vessel to fish on the open seas dates back to

Petitioner's use of its fishing vessel to fish was also "lawful" under all statutes and regulations that existed when petitioner purchased and outfitted the *Atlantic Star*, as the Federal Circuit also acknowledged. *Ibid.* Indeed, it was precisely because operation of the *Atlantic Star* was indisputably lawful under the Magnuson Act and its regulations when APFC purchased the *Atlantic Star*, as evidenced by the fact that NMFS subsequently issued all required permits to the *Atlantic Star*, that Congress had to enact entirely new legislation to accomplish its aim of banishing the vessel. Thus, even assuming that recent federal regulatory enactments like the Magnuson Act can redefine the scope of traditional property interests by outlawing particular traditional property uses—a highly dubious proposition, see *Palazzolo*, 533 U.S. at 630—it is undisputed that none did so here prior to petitioner's purchase of the *Atlantic Star*.

In short, it is undisputed that the vessel legislation outlawed what previously had been a lawful property use of the *Atlantic Star*. Under *Lucas*, confiscatory regulations "cannot be newly legislated" without triggering scrutiny under the Fifth Amendment. 505 U.S. at 1029. The utter irreconcilability of *Lucas* and the Federal Circuit's decision is apparent: In *Lucas*, the use at issue—construction of a single family home on private property—was a traditionally recognized property use that presumably had long been subject to a governmental building permit requirement as well as to various land-use regulations. Similarly, in this case, use of a fishing vessel to

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ancient times and has been an integral part of the common law since the 17th century. See H. Grotius, FREEDOM OF THE SEAS 26 (1633) (Oxford U. Press 1916). Congress specifically recognized this right when enacting the Magnuson Act, stating that "[f]or well over 300 years, one of the most basic principles of the freedom of the seas has been the freedom of fishing," that is, "free and open access to all stock on the high seas." H.R. Rep. No. 94-445, at 24 (1975).

fish in the EEZ was a traditional property use that was authorized under existing regulations but subject to permitting and certain regulatory restrictions. Yet in *Lucas*, the preexistence of a regulatory and permitting scheme (see 505 U.S. at 1007-1008) did ***not*** prevent property purchasers from acquiring a property interest that could be taken by new legislation restricting the property use. Here, the Federal Circuit held the opposite—that the preexistence of the Magnuson Act regulatory and permitting scheme ***did*** preclude vessel purchasers from acquiring a property interest that could be taken by new legislation governing the EEZ.

The Court should grant certiorari to make clear to the Federal Circuit that, under *Lucas*, legislative schemes that subject traditional property uses to regulation and permitting requirements do not thereby eradicate property interests and immunize the government from liability for subsequently regulating such uses out of existence.

B. The Federal Circuit's Decision Conflicts With This Court's Decision In *Palazzolo*.

The ruling below—that the vessel legislation did not implicate any property interest simply because the Magnuson Act "was already in place" when APFC acquired the *Atlantic Star* (App. 28a)—also directly conflicts with the Court's decision in *Palazzolo*. In *Palazzolo*, the Court specifically rejected the proposition endorsed by the Federal Circuit, *i.e.*, that a "new regulation, once enacted, becomes a background principle of property law which cannot be challenged by those who acquire title after the enactment." 533 U.S. at 629.

If an existing regulation that ***prohibits*** a particular property use does not prevent acquisition of a compensable property interest in the prohibited use, as the Court held in *Palazzolo*, *a fortiori* an existing regulatory framework (like the Magnuson Act) that ***allows*** a particular property use, but subjects it to a permitting requirement, does not prevent ac-

quisition of a compensable property interest in the permitted use. Yet the Federal Circuit held that it does.

As Justice O'Connor explained in her concurrence in *Palazzolo*, existing regulations—like the Magnuson Act regulations that governed petitioner's right to fish prior to its investment—do not ***foreclose*** acquisition of a property interest and hence a *Penn Central* regulatory takings analysis as the Federal Circuit held. Rather, they factor into the "reasonable investment-backed expectations" prong of that analysis. 533 U.S. at 635-636 (O'Connor, J., concurring); see also *Andrus*, 444 U.S. at 64 n.21 (rejecting the government's argument that, if the owners had acquired Indian artifacts after the effective date of the legislation restricting their use, they were barred at the threshold from asserting a takings claim and ruling instead that "[t]he timing of acquisition of the artifacts is relevant to a takings analysis of appellees' investment-backed expectations"); *Connolly* v. *Pension Ben. Guar. Corp.*, 475 U.S. 211, 227 (1986) (treating preexisting regulatory scheme as a factor in reasonable expectations inquiry); *Concrete Pipe & Prods., Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602 (1993) (same). The Federal Circuit erred by converting the presence of regulation from a single factor in the reasonable investment-backed expectations prong of the takings analysis into a threshold bar to the existence of any property right, foreclosing any takings analysis at all.[6]

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[6] That doctrinal error is particularly egregious where, as here, there is an undisturbed trial court finding on an undisputed record that the new legislation was "unforeseeable" under the preexisting regulatory regime. App. 66. Specifically, the trial court found that APFC's investment-backed expectations were "reasonable" under the preexisting Magnuson Act regime and that APFC could not have foreseen that Congress would make that regime "uniquely unavailable" to APFC. *Id.* at 54.

The Court should grant certiorari to rein in the Federal Circuit's sharp departure from *Palazzolo* and confirm that the government may not, "by prospective legislation[,] * * * shape and define property rights," thereby precluding subsequent owners from bringing takings claims simply because "they purchased or took title with notice of the limitation." 533 U.S. at 626. It should further confirm that *Palazzolo* applies with particular strength where, as here, the preexisting regulatory regime neither barred the property use at issue nor made it reasonably foreseeable that it would be barred. See *supra* n.6.

C. The Federal Circuit's Decision Conflicts With This Court's Decisions Recognizing That Regulatory Schemes Do Not Preclude Property Rights.

The court below ruled that the government's authority to regulate fishing cannot co-exist with recognition of a property right to fish in the EEZ because there can be no property right in a use subject to "governmental permission." App. 29a. But just as "the right to build on one's own property" is subject to the Takings Clause "even though its exercise can be subjected to legitimate permitting requirements" (*Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 833 n.2 (1987)), the same is true of the right to use one's fishing boat to fish. The question in each instance is whether the regulations adopted are confiscatory, as assessed under the three-pronged *Penn Central* test.

The court of appeals' ruling is irreconcilable with the numerous cases in which this Court has engaged in a takings analysis notwithstanding that the subject property had long been subject to pervasive governmental regulation, including permit requirements. As noted *supra* pp. 13-14, *Lucas* is a prominent recent example: existing building permit requirements and land-use restrictions did not foreclose Lucas from acquiring a Fifth Amendment-protected property interest that

could be taken by new confiscatory legislation. The same has been true in numerous other cases. See, *e.g.*, *City of Monterey* v. *Del Monte Dunes*, 526 U.S. 687, 699 (1999) (affirming verdict for developer on takings claim based on permit denials); *Dolan* v. *City of Tigard*, 512 U.S. 374, 395 (1994) (governmental conditions on development permit took property interest); *Hodel* v. *Irving*, 481 U.S. 704, 712 (1987) (engaging in taking analysis where Congress had "broad authority to regulate the descent and devise of Indian trust lands"); *United States* v. *Riverside Bayview Homes*, 474 U.S. 121, 128 (1985) (Takings Clause requires just compensation for takings that result from the government's "exercise of jurisdiction over wetlands"); *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555, 602 (1935) (Bankruptcy Act's elimination of lienholders' right to resort to mortgaged property was a taking despite the federal government's bankruptcy authority). Indeed, in *Penn Central* itself, the fact that the proscribed use required a construction permit did not mean that no property interest was at stake; otherwise the Court would have had no need to articulate and apply the factors pertinent to evaluation of the owners' takings claim.

In none of these cases did the Court preempt a takings analysis by holding, as did the court below, that there can be no property right to use property in a manner subject to governmental permission. The Court consistently has recognized that, although the government unquestionably has regulatory power to limit or even bar uses of property, it must pay just compensation when it exercises that power in a confiscatory manner, which only a takings analysis can assess.

The court of appeals sought to avoid this conclusion by suggesting that, by asserting "sovereign rights" to regulate fishing in the EEZ, the government had acquired "ownership" of the fish, thereby precluding APFC from acquiring a competing property interest to use its vessel to fish. App. 28a-29a. But this Court has rejected the cases on which the court of appeals relied (*id.*), holding that the government's

"sovereign rights" over fishing do ***not*** constitute "ownership" of fish and ***are*** subject to constitutional limitations:

> [I]t is pure fantasy to talk of "owning" wild fish, birds, or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture. * * * Under modern analysis, the question is simply whether the State has exercised its police power [to regulate fishing] in conformity with the federal laws and Constitution.

Hughes v. *Oklahoma*, 441 U.S. 322, 334-335 (1979). That question—"whether the [government] has exercised its police power [to regulate fishing] in conformity with" the Constitution—can be answered in a takings case only by performing the takings analysis disposed of by the Federal Circuit.[7]

D. The Federal Circuit's Ruling Conflicts With Decisions Of Other Courts Of Appeals And State Supreme Courts.

Because the Federal Circuit has exclusive jurisdiction over takings claims against the federal government, the ruling below will bar at the threshold ***all*** takings claims against the federal government involving restrictions on property

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[7] Nor should the Federal Circuit's invocation of the United States' "'sovereign rights'" over the EEZ (App. 26a, quoting 16 U.S.C. § 1811) confuse matters. All regulation is pursuant to the government's "sovereign rights" or "sovereignty" over the territory within which the regulated activity occurs. Indeed, even if the United States had asserted full "sovereignty" over the EEZ rather than lesser "sovereign rights," that still would not preclude private property interests within the EEZ. That point is illustrated by the indisputable fact that individuals possess private property interests protected by the Takings Clause within the territorial United States, over which the United States asserts full sovereignty.

uses that are subject to regulatory permission unless the Court intervenes. In similar circumstances, the Court repeatedly has reviewed questionable decisions of the Federal Circuit absent any conflict in the circuits. See, *e.g.*, *Scarborough* v. *Principi*, 124 S. Ct. 1856 (2004) (reversing Federal Circuit's decision dismissing claim against United States for lack of subject matter jurisdiction); *Franconia Assocs.* v. *United States*, 536 U.S. 129 (2002) (reversing Federal Circuit's ruling that contract repudiation and takings claims were properly dismissed as untimely).

Here, there is even greater reason to review the Federal Circuit's decision because it conflicts with rulings of other courts of appeals and state supreme courts regarding takings claims against ***state and local*** governments. These rulings recognize that the presence of a regulatory regime is not a bar to a property interest but simply a factor in determining whether a property interest was taken. *E.g.*, *Philip Morris, Inc.* v. *Reilly*, 312 F.3d 24, 26, 31-32 (1st Cir. 2002) (finding "a property interest" in tobacco companies' trade secrets notwithstanding the "heavy regulation" to which the states subject tobacco manufacturing); *Vulcan Materials Co.* v. *City of Tehuacana*, 369 F.3d 882, 887 (5th Cir. 2004) (holding that quarry lessee's right to mine limestone was property interest subject to takings analysis notwithstanding heavy local regulation of limestone mining); *Vesta Fire Ins. Corp.* v. *Florida*, 141 F.3d 1427, 1431 n.8 (11th Cir. 1998) (recognizing that "insurance contracts can be property subject to an unconstitutional taking" notwithstanding extensive state regulation of insurance industry); *Canel* v. *Topinka*, 818 N.E.2d 311, 325-326 (Ill. 2004) ("dividends accruing on stock held by the state" under unclaimed property statute constitute property subject to the Takings Clause notwithstanding state's pervasive regulation of such property); *Okemo Mountain, Inc.* v. *Town of Ludlow*, 762 A.2d 1219, 1227 (Vt. 2000) (regulatory power of state agency over public roads in state forests did not prevent abutting property

owner's right of access from being a property right subject to the Takings Clause).

The stark conflict between these decisions and the ruling below must be resolved because there is no principled reason why federal constitutional Takings Clause protection of property interests subject to government regulation should depend on whether the defendant is a federal, state, or local government. See, *e.g.*, *City of Monterey*, 526 U.S. at 704 (approving jury instructions for takings claim against local government that were consistent with principles set forth in *Lucas*); *Sheffield Dev. Co.* v. *City of Glenn Heights*, 140 S.W.3d 660, 674 (Tex. 2004) (Texas courts "look to federal takings cases for guidance").

E. The Court's Guidance Is Needed To Prevent Misuse Of The "Background Principles" Exception To Property Rights.

Lucas declared that restrictions on property rights may not be "newly legislated or decreed" without implicating the Takings Clause. 505 U.S. at 1029. Yet the Federal Circuit and some State courts have misused the narrow "background principles" exception to property rights recognized in *Lucas* to allow just that.[8] By deeming existing government regula-

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[8] See Callies & Breemer, *Selected Legal and Policy Trends in Takings Law: Background Principles, Custom and Public Trust 'Exceptions' and the (Mis) Use of Investment-Backed Expectations*, 36 Val. U. L. Rev. 339, 379 (2004) (criticizing courts that are "newly discovering or expanding [background] principles"); Burling, *The Latest Take on Background Principles and the States' Law of Property after* Lucas *and* Palazzolo, 24 U. Haw. L. Rev. 497, 502 (2002) ("governmental regulators and sympathetic courts have been quick to 'rediscover' (as opposed to define anew) limitations on the use of property"); Eagle, *The 1997 Regulatory Takings Quartet: Retreating from the 'Rule Of Law'*, 42 N.Y.L. Sch. L. Rev. 345, 346 (1998) (criticizing holdings of New York's high-

tions to be "background principles" inhering in the owner's title, these courts deprive traditional property uses of Takings Clause protection. They thereby allow the government to adopt entirely new property restrictions of previously regulated uses free from constitutional constraint. Granting the petition will enable the Court to clarify that the "background principles" exception does not insulate government from its just compensation obligation when it restricts traditional property uses that are subject to regulation.

Absent correction by this Court, misuse of the "background principles" exception by the Federal Circuit and State courts threatens to nullify the *Lucas* framework. As Justice Scalia joined by Justice O'Connor observed in dissenting from denial of certiorari in *Stevens* v. *City of Cannon Beach*, 510 U.S. 1207, 1211 (1994): "Our opinion in *Lucas* * * * would be a nullity if anything that a State court chooses to denominate 'background law'—regardless of whether it is really such—could eliminate property rights." The point applies equally here, although the court that has "cho[sen] to denominate" a regulatory framework that is not "really such" is federal. The fact that this federal court has exclusive jurisdiction over all appeals involving takings claims against the federal government underscores the importance of reviewing its decision. Clarification of the meaning of "background principles" and specifically of the impact of regulatory schemes on the existence of property rights will ensure that this Court's precedents are adhered to and provide critical guidance to courts addressing these issues.

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est court that preexisting regulations "inhere in a purchaser's title").

II. THE COURT OF APPEALS' RULING THREATENS DESTRUCTION OF PROPERTY RIGHTS ON A VAST SCALE

The implications of the court of appeals' novel ruling that the government's sovereign regulatory authority ***forecloses*** a takings analysis are astounding. That ruling would enable the federal government to enact—without risk of consequence or compensation—confiscatory regulations throughout not only the EEZ but ***all*** areas over which the government has regulatory jurisdiction, including all navigable waters, federal lands, federal highways, and airspace. At minimum, the court of appeals' cramped view of property rights would immunize confiscatory bans on ***any*** use of personalty requiring a permit to operate in a federally regulated area. Permits are required for a barge to carry freight on a river, for a truck to carry cargo on public highways, and for a plane to fly over U.S. territory. Thus, according to the court below, new legislation barring barge, truck, or air transport would implicate no property right.

Moreover, there is no principled distinction between holding that government regulation of fishing in the EEZ forecloses a property interest and holding that regulation of ***any*** traditional property use, such as land development that is not a nuisance, forecloses a property interest. In both cases, the proscribed use depends on regulatory permission; in neither case has the use "always" been unlawful under "background principles" of property law; and in neither case does the proscribed use conflict with any competing property right of the government. The ruling below thus threatens ***all*** property, real or personal, use of which is subject to regulation.

These intolerable consequences flow from the Federal Circuit's absolutist approach. The Court long has stressed that whether a use restriction takes property requires a concrete analysis of "particular circumstances." *Penn Central*, 438 U.S. at 124. The ruling below circumvents that require-

ment by making the presence of regulation a threshold bar to the very existence of a property interest. If the government could routinely avoid paying the price of confiscatory measures based merely on the fact that the newly proscribed use was subject to "governmental permission," as the court of appeals held (App. 29a), the government could accomplish by legislation what it could not accomplish by physical seizure—complete abrogation of uses of property without risk of paying just compensation. If that were the law, the Takings Clause would no longer stand "as a shield against the arbitrary use of governmental power." *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 164 (1980).

The court of appeals' decision will destabilize property rights. Today's regulatory regime could be withdrawn tomorrow and reinstated next month. The existence of a cognizable property right should not depend on each shift in the regulatory winds. Otherwise, private property will cease to be the protective bulwark against oppressive government intended by our Constitution's framers. See J. Nedelsky, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 9 (1990).

As this Court has explained, the "character and value" of government is measured by "the securities which surround the individual in the use and enjoyment of his property." *Olson* v. *United States*, 292 U.S. 246, 254 (1934). Permitting the government to circumvent its compensation obligation merely by asserting its regulatory authority, as the court of appeals held, would undermine if not remove those securities by allowing the government to engage in cost-free confiscation. See D. Dana & T. Merrill, PROPERTY TAKINGS 42-43 (2002). The Court should reject such a judicial evisceration of the Takings Clause.

III. HAD THE FEDERAL CIRCUIT PERFORMED A TAKINGS ANALYSIS, IT WOULD HAVE HAD TO AFFIRM THE JUDGMENT FOR APFC.

Had the Federal Circuit proceeded to a takings analysis rather than improperly pretermitting one, it would have had to conclude that the vessel legislation worked a classic regulatory taking of petitioner's property. Based on a factual record that was largely "undisputed" (App. 38a n.1), the trial court correctly concluded that the vessel legislation worked a temporary taking under *Penn Central* because it was extraordinary governmental action that deprived APFC of all economically viable use of its vessel for 20 months and defeated APFC's reasonable expectations. App. 63a-70a. The Court therefore should reinstate the trial court's judgment.

Indeed, the trial court's finding that the *Atlantic Star* was deprived of "all profitable uses" during the takings period (App. 66a) makes this a "per se" or "categorical" taking under *Lucas*, 505 U.S. at 1027. Accordingly, there is no need to apply the *Penn Central* factors to reinstate the trial court's judgment. However, as the trial court correctly concluded, the *Penn Central* factors likewise establish a taking.

First, the character of the governmental action was "extraordinary." *Babbitt* v. *Youpee*, 519 U.S. 234, 239-240 (1997). The legislation overrode an existing regulatory framework to target a single owner's property interest. See *Nollan*, 483 U.S. at 835 n.4 (regulation may become a taking when owners are "singled out"). It abrogated valid permits, thereby imposing "severe retroactive liability on a limited class of parties that could not have anticipated the liability." *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 528-529 (1998); see *Louisville Joint Stock Land Bank*, 295 U.S. at 601-602 (retroactive abrogation of security interests was a taking). Further, the legislation lacked a nexus to any conceivable harm to the flourishing fish stocks at issue. App. 42a. See *Nollan*,

483 U.S. at 837 (lack of proportionate "nexus" between the government's ends and means indicated taking).

Second, the economic impact on petitioner was devastating. As the trial court found on this "predominantly factual question" (*City of Monterey*, 526 U.S. at 720), the *Atlantic Star* was barred from fishing anywhere in the EEZ, thereby destroying any possibility of putting the vessel to profitable use. App. 51a-52a, 66a.

Third, the legislation interfered with petitioner's investment-backed expectations. Those expectations were eminently reasonable and based largely on the government's own data and assurances. Cf. *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1013 (1984) (reliance on government's assurances made property owner's expectations reasonable). As the trial court found, APFC reasonably relied on (1) the government's urgings to deploy large vessels in the North Atlantic fisheries; (2) the absence of entry restrictions in the Atlantic mackerel and herring fisheries; (3) the permits the government issued to the *Atlantic Star*; (4) the regulations that mandated renewal of those permits except for misuse, absent here; and (5) the government's history of compensating permit holders when reducing fishing rights. App. 63a-65a. When APFC made its investment, vessel size limits had never been imposed or even suggested by Congress or NMFS. Even if APFC could have imagined, contrary to all evidence, that the government would restrict access to the Atlantic mackerel and herring fisheries, it could not reasonably have expected that its vessel alone would be targeted for banishment.

Finally, the trial court properly awarded just compensation equal to the *Atlantic Star*'s fair rental value during the takings period, based on voluminous trial evidence. See App. 110a-116a; *United States* v. *Pewee Coal Co.*, 341 U.S. 114, 117 (1951) ("fair compensation for a temporary possession of a business enterprise is the reasonable value of the property's use"); *Kimball Laundry Co.* v. *United States*, 338

U.S. 1, 7 (1949); *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304, 318 (1987). If the government had physically occupied the *Atlantic Star* for twenty months, it certainly would have had to compensate APFC for its temporary taking. See *Kimball Laundry*, 338 U.S. at 14. The appropriations legislation had precisely the same impact as a seizure, depriving APFC's vessel of "all profitable uses" until it was sold. App. 66a. The trial court properly applied the Court's temporary taking precedents to award just compensation equivalent to what APFC would have earned during that period but for the legislation. *Id.* at 110a-113a.

The court of appeals' ruling sanctions petitioner for accepting the government's invitation to invest in a large vessel to harvest underutilized fisheries. Allowing the government to play bait and switch without consequence not only flouts the Constitution and the Court's precedents but discourages private investors from relying on governmental assurances, thereby harming the interests of the United States. Reinstating the trial court's judgment will send a reminder to our elected representatives that the government remains constitutionally accountable when, at the behest of certain of its constituents, it requires "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 2005